L. MULKH RAJ SHARMA

v.

SHANTI SROOP

FEDERAL COURT, IPOH
ABDUL HAMID OMAR FJ
MOHD. AZMI FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 299 OF 1982]
10 SEPTEMBER 1983

LANDLORD AND TENANT: *Claim for possession of premises - Whether plaintiff the tenant - Whether defendant a licensee - Whether joint tenancy existed - Notice of termination - Whether valid.*

CIVIL PROCEDURE: *Appeal - Finding of fact by lower Court - Power of review of appellate Court.*

The appeal was against the decision of Ajaib Singh J allowing the appeal by the defendant against the decision of the Magistrate ordering the defendants (the second defendant having entered no defence was precluded from defending) to deliver vacant possession of the premises in question. The parties to the proceedings were brothers.

Held:

[1] The question in issue before the Court was not one of Hindu joint family property but of a joint tenancy, which was a question of fact to be determined in the light of the totality of the evidence.

[2] There was nothing to show that the conclusion arrived at by the Magistrate on a balance of probabilities was plainly wrong. The Magistrate could not be said to have erred in law and to have misdirected herself if she had made a conclusion or inference on the basis of the evidence before her.

[3] There was no justification for the Judge to displace the Magistrate's finding and substitute his own. To justify the Judge in disturbing the Magistrate's conclusion, the Judge must be satisfied that the Magistrate had failed to take proper advantage of having seen and heard the witnesses. (*Yahya bin Mohd. v. Chin Tuan Ham* [1975] 2 MLJ 117 PC).

[Appeal allowed.]

Cases referred to:

In Re The Estate of T.M.R.M. Vengadalasalam Chettiar Deceased [1940] 9 MLJ (SSR) 155
Chow Yee Wah and Anor. v. Choo Ah Pat [1978] 2 MLJ 41 PC
Yahya bin Mohd. v. Chin Tuan Ham [1975] 2 MLJ 117 PC

For the appellant - N.T. Rajah; M/s. Maxwell, Kenion, Cowdy & Jones
For the respondent - W.S.W. Davidson (H.R. Paul with him); M/s. Azman, Davidson & Co.

JUDGMENT

Abdul Hamid Omar FJ:

The appeal before us is by the plaintiff L. Mulkh Raj Sharma against the decision of Ajaib Singh J allowing the appeal by the defendant Shanti Sroop (Ipoh C.A. No. 18 of 1980) against the decision of the Magistrate ordering the defendants, Shanti Sroop and Inderjeet Sharma,

the latter having entered no defence was precluded from defending, to deliver vacant possession of premises No. 37, Lahat Road, Ipoh (we call "the premises"). We now refer only to the first defendant as "the defendant".

The parties to the proceedings are brothers. The plaintiff is the youngest while the defendant is the eldest, both sons of Lall Chand. There are two other brothers.

This case had dragged on for almost 12 years. There was an inconceivable delay and to get a clear picture of the circumstances leading to the present appeal we would state briefly that the suit filed in July 1971 was first heard in the Magistrate's Court on 14 December 1972. After a lapse of almost 1 1/2 years the part-heard case was heard *de novo* because the Magistrate had gone on transfer. The case was fixed for 10 June 1974 but was not heard until 26 August 1977 after a lapse of another four years. The delay was to a large extent brought about by an incredible number of postponements and a sudden request for reference to arbitration. It was concluded on 3 July 1980 a lapse of another three years. It came to the High Court on appeal and the matter was disposed on 15 October 1982. The appeal before us was heard on 18 July 1983.

We would now direct our attention to the allegations contained in the statement of claim and the defence and determine the issues therefrom. Since they are quite brief, we would for convenience set out fully both the statement of claim and the statement of defence, as follows:

Statement of Claim

1. The plaintiff is the tenant of premises No. 37 Lahat Road, Ipoh at a monthly rent of RM70.
2. The defendants are brothers of the plaintiff.
3. Until 16 June 1971 the plaintiff permitted the defendants and their families to live in the premises free of any rent in view of the relationship between the parties and they have been in occupation as licensees and on 16 June 1971 by a letter of the same date sent through his solicitors the plaintiff terminated the licence and gave the defendants notice to vacate the premises.
4. The defendants have failed to vacate the premises and are in wrongful occupation.
   And the plaintiff claims:
   (a) Possession of the premises.
   (b) Damages not exceeding the jurisdiction of this Court.
   (c) Costs.

Defence of First Named Defendant

1. Paragraph 1 of the statement of claim is denied.
2. Paragraph 2 of the statement of claim is admitted.
3. Paragraph 3 of the statement of claim is denied. The first defendant has been in lawful occupation of the premises as a joint tenant since the year 1937.
4. The first defendant admits receipt of the letter dated 15 June 1971 but denies that he was a licensee, and states that the said letter was ineffective to and did not terminate his tenancy.
5. Whereof the first defendant prays that the plaintiff's claim herein be dismissed with costs.

So far as we can gather from the pleadings the central issue is whether the plaintiff is a tenant, the defendants licensees or the plaintiff and the defendant are joint tenants. There also emerges from the pleadings the question of validity of the letter by the plaintiff dated 16 June 1971, terminating the tenancy. It is asserted by the defendant that it was null and void and of no effect on the ground that he was a joint tenant.

The learned Magistrate in her grounds of decision observed that though the defendant stated that he is a joint tenant he however claimed in the course of the hearing that the tenancy was a Hindu joint family property and he is a joint tenant by virtue of his being a member of that unit. The Magistrate dealt at length on the applicability of the Hindu law of joint families and joint family properties. She also considered whether a tenancy could form part of Hindu joint family property. Proceeding on the assumption that a tenancy could so form she directed her mind to the facts available and came to the conclusion that there was no Hindu joint family as a legal entity. She then went on to say thus:

> Apart from a bald statement by DW1 first defendant that a tenancy can form part of Hindu joint family property, this point was not dealt with either by the plaintiff or the defendant. No expert on Hindu law was called by the defence. Following the case of *Sivagami Achi v. P.RM. Ramanathan Chettiar and Anor*. [1959] 25 MLJ 221, the Court is not entitled to take judicial notice of Hindu law in the absence of expert evidence or arguments based on authoritative decisions dealing with the issue before the Court.

On the facts before her the learned Magistrate adverted to various aspects of the case to consider whether the plaintiff or the joint family was the tenant, namely:

(a) the background of the parties *vis-a-vis* the family background prior to 1937 when the plaintiff's and the defendant's father was a member of a Hindu joint family comprising of him and his six brothers, and the fact that the family was partitioned in 1937 with Lall Chand receiving the tenancy of the shop in question;

(b) the fact that throughout the years the said premises had been occupied by the parties and their families and that to this date the defendants and their families still occupy the premises;

(c) the fact that the plaintiff lived in the premises and that part of it was used as an office until 1970 when he left on account of an alleged assault by the defendant's son;

(d) the fact that neither Lall Chand nor any of the parties owned the premises but was owned by four co-owners one of whom was one Mohd. Jamil (PW4);

(e) rent receipts were first issued to Lall Chand until his death in 1951 when they were issued to Messrs. Shanti Sroop-Joti Sroop registered in the names of Shantisroop (eldest son of Lall Chand) and the defendant. At one stage after Lall Chand's death rent receipts were issued to the 2nd defendant (no defence filed) but finally to the plaintiff until the present day;

(f) the fact that between March 1965 and April 1968 the defendant paid the rent at a time when the plaintiff was in India. There was an assertion by the plaintiff however that he left funds to the defendant to pay the rent. No rent receipts from this period were produced. Nevertheless Mohd. Noor one of the co-owners testified that receipts were issued in the name of the plaintiff; (Magistrate accepted PW4's testimony and held that receipts continued to be issued in the name of the plaintiff);

(g) rents for the ground floor of the premises (shop portion) were paid to the plaintiff for which no explanation was given by the defendant. There was also a notice of the application to increase rent and this notice was addressed to the plaintiff as tenant (Exh. P1B) (see also P11) and was not as representative of the property of the joint family.

The Magistrate considered the defence contention that there was still a joint family of him and his brothers after the partition. A brother not a party to the suit was called to testify. She noted however that the defendant admitted that no accounts had been kept after the death of their father. Instead each kept his own account.

The Magistrate concluded that upon examination of the facts and even though there is a decision (*In Re The Estate of T.M.R.M. Vengadalasalam Chettiar Deceased* [1940] 9 MLJ (SSR) 155, to the effect that where once a Hindu family is joint it is presumed to remain joint until the contrary is shown, the presumption has been rebutted by the available evidence.

As for the ownership of the firm to Shantisroop-Jotisroop the Magistrate reviewed the evidence and came to the conclusion that it belonged not to the joint family but to the defendant and his brother as partners. In drawing the conclusion the Magistrate had regard to the accounts (P15) and the absence of any mention in the will of Lall Chand of either the firm or the tenancy. The fact that there was no Hindu joint family property was, she said, borne out by the fact that Daulratnam Estate, one of the properties in the list of assets mentioned in the will of Lall Chand, ceased to be joint family property in 1937 and has since been Lall Chand's personal property and thus the estate never became joint family property of the defendant, the plaintiff and their brothers.

The learned Magistrate examined minutely the evidence of Mohd. Jamil (PW4) who was the landlord and decided that his evidence could not be given much weight. She took into account the contradictions in PW4's testimony viewed in the light of the testimony given by him at the previous hearing in December 1972.

After viewing the evidence in totality the learned Magistrate made a finding "on the balance of probabilities" in favour of the plaintiff stating further that "whatever might have been the arrangement between the members of the family which allowed the premises to be utilised as a family house, there was no Hindu joint family as a legal entity and I found that the 1st defendant could not succeed."

The learned Judge on appeal reversed the decision of the Magistrate stating that on close analysis of the evidence it seemed to him that this was a joint tenancy of the family which includes all four brothers. The learned Judge had regard to:

(a) the fact that rent receipts were issued to various members of the family and were only issued to plaintiff as the family representative;

(b) that it was a family home from 1937 and the father was the tenant;

(c) that the defendant paid rent for years between 1965-1968;

(d) that the issue of receipts by plaintiff to firm Shantisroop-Jotisroop was not inconsistent with plaintiff being representative of the joint family;

(e) that the letters from the plaintiff to the defendant (D7 and D19) show that the plaintiff treated the whole family business in Malaysia as belonging to the joint family.

The learned Judge also dealt with the evidence of PW4, the landlord, and directed his attention to the contradictions. He formed the view that PW4 was trying to help the plaintiff by changing his earlier testimony. The Judge summed up by saying that on the evidence the plaintiff had failed to prove he alone was the tenant of the premises and that his brothers were mere licensees. He was also of the view that there was overwhelming evidence to support the defence contention that this was a joint tenancy of the family.

At the very outset we would like to observe that the question in issue is not one of Hindu joint family property but of a joint tenancy. The question of Hindu joint family property was not raised in the pleadings and only emerged in the course of the hearing. The sole issue is therefore one of fact to be determined in the light of the totality of the evidence. The main ground of appeal submitted by Mr. N.T. Rajah Counsel for the appellant was directed to the Judge's error in upsetting the finding of fact made by the Magistrate. He also submitted that the learned Judge had erred when he misdirected himself on the onus of proof throwing it on the appellant.

Counsel for the respondent, on the other hand, submitted at length dwelling on the facts of the case. He also submitted that the Magistrate misdirected as to the issues and on the onus of proof. It is the respondent's contention that since the appellant was the one trying to get possession the onus was on the plaintiff to establish that the respondent was a licensee and this he failed to do.

In our view, and we stress, there was only one central issue before the Magistrate and that was whether the plaintiff was the tenant and the defendant a licensee or whether both the plaintiff and the defendant were joint tenants. This sole issue clearly has to be determined essentially with reference to and in the light of the facts and the circumstances surrounding; a conclusion to be arrived at on balance of probabilities. The Magistrate cannot, in our view, be said to have erred in law and to have misdirected herself if she, after hearing and seeing the witnesses, had made a conclusion or inference on the basis of the evidence before her after giving due regard to what on balance was the weight of the evidence. In that event a Judge hearing an appeal should not substitute his finding for that of the Magistrate on those facts unless the conclusion arrived at by the Magistrate was plainly wrong and any advantage which the Magistrate enjoyed by having seen and heard the witnesses was not sufficient to explain her conclusion.

There are a host of authorities dealing with principles on which the Appellate Court should act in reviewing a finding of fact, however, suffice if we refer only to the case of *Chow Yee Wah and Anor. v. Choo Ah Pat* [1978] 2 MLJ 41 PC where it was held that:

> in the face of the finding by the trial Judge on the question of fact the Federal Court were only entitled to displace his conclusion if they were satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.

We have in this appeal scrutinized in depth the evidence analysed by the Magistrate and we can see nothing to show that the conclusion arrived at by the Magistrate on a balance of probabilities, was plainly wrong. We do not therefore see any justification for the learned Judge to displace the Magistrate's finding and substitute his own. Evidence acted upon by the learned Judge was the same evidence considered by the Magistrate in great detail. To justify the learned Judge to disturb the Magistrate's conclusion he must be satisfied that the Magistrate had failed to take proper advantage of her having seen and heard the witnesses. (See *Yahya bin Mohd. v. Chin Tuan Ham* [1975] 2 MLJ 117 PC).

In our judgment the appeal should be allowed. We accordingly set aside the Judge's order with costs here and in the Court below. The order of the Magistrate is to be restored.

Also found at [1984] 1 CLJ 24